

NO. 49415-9-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

Division Two

STATE OF WASHINGTON,

Respondent,

v.

S.T.W.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

BRIEF OF APPELLANT

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A. Summary of Argument

S.W. attended an after-school get-together with other classmates where he foolishly made unwanted contact with another peer. While the contact may have been unwanted there is no evidence that S.W. acted for his own sexual gratification.

B. Assignments of Errors

The trial court erred in finding S.W.'s conduct was sexually motivated.

C. Issue Pertaining to Assignment

When determining whether contact was committed with "sexual motivation" or "sexual contact," courts must determine if the contact was done for sexual gratification. Where S.W. only contacted J.L. through her clothing, did the trial court err when it found sexual motivation with no additional evidence of sexual gratification?

D. Statement of the Case

S.W. is a sixteen-year-old boy who was found guilty of assault in the fourth degree with sexual motivation, a gross misdemeanor. CP 11.

After school ended on Friday February 12th, 2016, S.W. went over to his friend's, Mandale Tolefree, residence located 3304 Edgewater Blvd NE in Lacy for a get-together with four other classmates. RP 12,

RP 133. Tolefree's parents were not present at the time and multiple teens, including S.W., were consuming alcohol. RP 20, RP 55. Five days later, on Wednesday February 17th, 2016, J.L. talked to a school counselor and Officer McClanahan about what had transpired the previous Friday at the teen get-together. RP 12. Officer McClanahan started an investigation based on J.L.'s claim and S.W. was subsequently charged with fourth degree assault with sexual motivation. CP 11.

At trial, three of the teens in attendance; J.L., Tolefree, and Taylor Matthews (J.L.'s close friend) testified to what had transpired on February 12th. RP 38, RP 74, RP 132. The specifics of what happened, however, were wildly inconsistent from one witness to another. *Id.* J.L. claimed that all the teens were watching television in the living room and while "laying on her front" next to Damon (another boy in attendance) S.W. jumped on her and started making a humping motion. RP 51-52. She also stated that S.W. touched one of her breasts RP 54. J.L. told him to "stop" and "get off" and shortly after Tolefree helped him off of her. RP 53. After S.W., who had been laughing the entire time, got off her, she followed him and Tolefree into the kitchen to take a shot. RP 55. Sometime after that, J.L. stated that she yelled to

Matthews (who had since gone upstairs with Tolefree) that she wanted to leave. RP 56. Matthews did not respond, so J.L. and Damone went upstairs to get her. *Id.* Her and Matthews, on their way back down the stairs, ran into S.W.. J.L. claimed there was an altercation that started with Matthews pulling S.W. from the top of the stairs and ended with S.W. laying on the floor by himself. RP 57. As J.L. tried to step over S.W., she claims that S.W. touched her leg and started “sliding his hand up.” RP 58. She stated however that he did not grab her pelvic area. *Id.* J.L. and Matthews decided at that point to leave and to go to the park. *Id.* On their way back from the park they passed by Tolefree’s residence where J.L. testified that S.W. was banging on the door. RP 62-63. As they passed, J.L. claimed S.W. started following them until he got to his house. *Id.* Days later S.W. met up with J.L. on the bus, where, as J.L. states, S.W. came up to her and said “I just want to apologize for what I did to you. I did not realize what I had done to you.” RP 109.

As mentioned, testimony from others who were present at the get-together is inconsistent with J.L.’s recounts. RP 74, 132. Matthews, who J.L. still considers a best friend, testified that she did not see S.W. inappropriately touch J.L. that day. RP 80. Her version of the events involved S.W. and Damone wrestling on the couch but that she could

not remember J.L. sitting on the couch with them. RP 79-80, 82. She stated that the reason that her and J.L. left that afternoon was because J.L. told her that “S.W. had touched her when we had fallen down the stairs.” RP 80. Her version of the incident on the stairs involved S.W. falling from the top of the stairs onto herself and J.L. with all of them ending up in a “dog pile” at the bottom, but that all of them got up after that and that she didn’t see S.W. try to touch J.L.. RP 82.

Tolefree stated in his version of the events that J.L. was laying on top of Damone on the couch when S.W. tripped over the coffee table and fell on both of them. RP 142. All three were laughing at first but then Damone starting getting mad because “all the weight was on him.” RP 142, 161. He stated that after about 15 seconds J.L. told S.W. to “get off” and he went to pull S.W. off of the pile. RP 163. Tolefree also stated that he never heard S.W. make any sexual statements regarding J.L. but did have a conversation with S.W. about wanting to talk to J.L. on the bus to tell her that “I didn’t... touch you or anything like that.” RP 144, 146.

J.L.’s perception of the events was the only evidence presented by the state to show that S.W.’s actions were sexually motivated.

E. Argument

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE COURT’S FINDING THAT S.W.’S ACTIONS WERE FOR HIS SEXUAL GRATIFICATION.

a. The State must prove the sexual motivation allegation beyond a reasonable doubt.

Where the state alleges a non-sex offence was committed for the purpose of sexual gratification, the state must prove that allegation beyond a reasonable doubt. *State v. Vars*, 157 Wn. App. 482, 494, 237 P.3d 378 (2012).

RCW 13.40.135 states “[t]he prosecuting attorney shall file a special allegation of sexual motivation in every juvenile offense other than sex offenses as defined in RCW 9.94A.030 when sufficient admissible evidence exists...” Sexual motivation is defined by RCW 13.40.020 to mean “that one of the purposes for which the respondent committed the offense was for the purpose of his or her sexual gratification.” The purpose of the statute is to punish a defendant for acting criminally based on sexual thoughts. *State v. Halstien*, 122 Wn.2d 109, 123, 857 P.2d 270 (1993). It is intended to signify that a person who acts for the purpose of sexual gratification is more culpable than a person who does not share that motivation. *Id* at 124.

Sexual gratification is also used to defined “sexual contact,” an element of first degree child molestation. *State v. Powell*, 62 Wn. App. 914, 916, 816 P.2d 86 (1991). Sexual contact is defined by RCW 9A.44.10 to mean “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” While sexual gratification is not an explicit element to satisfy the statutory element of sexual contact the State must prove a defendant acted for the purpose of sexual gratification beyond a reasonable doubt. *See State v. Stevens*, 158 Wn.2d 304, 309, 143 P.3d 817 (2006); *State v. Veliz*, 76 Wn. App. 775, 778, 888 P.2d 189 (1995); *Powell*, 62 Wn. App. at 917. Second degree child molestation also necessarily includes the elements of fourth degree assault. *Stevens*, 158 Wn.2d at 311.

By definition, sexual gratification is at the heart of assault in the fourth degree with sexual motivation and cases where “sexual contact” must be proven beyond a reasonable doubt, thus the standards to determine sexual gratification for one are also used determine the other.

b. When contact is through the clothing, that contact is not Per Se evidence of sexual motivation.

In determining “sexual contact” where “the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, ... some additional evidence of sexual gratification [is required].” *Veliz*, 76 Wn. App. 778; *Powell*, 62 Wn. App. at 917.

Cases that have looked for additional evidence have considered the length of time of the touching, whether threats or bribes were made not to tell, whether the touching took place alone or in front of others, and whether there were previous indications of a sexual attraction. *See e.g. State v. Hardstad*, 153 Wn. App. 10, 218 P.3d 624 (2009); *Powell*, 62 Wn. App. 914. In *Powell*, the court determined there was not sufficient evidence of sexual gratification. *Id* at 916. There, the court considered two incidents. *Id*. The first incident occurred when Windy was sitting on Powell’s lap and as Powell assisted windy off his lap he touched her “front” and “bottom. *Id*. The second incident occurred in Powell’s truck when Powell touched both of Windy’s thighs. *Id*. The court said that the evidence of Mr. Powell's purpose in both touching’s was equivocal and

susceptible to innocent explanation and that additional evidence of sexual gratification would be required for a tire of fact to find the essential element. *Id* at 917-918.

In *Hardstad* the court pointed to the evidence that incidents took place “at night when everyone else was asleep.” *Hardstad*, 153 Wn. App. at 21. The court also stated that even though there was no evidence Hardstad touched his victim under her clothing, the fact that he moved his hand back and forth on her upper thigh coupled with his heavy breathing was sufficient to show an inference of a sexual purpose. *Id* at 22-23.

Here, S.W.’s contact was through the clothing which means the state was required to present additional evidence of sexual gratification. The state provided no evidence that S.W. had any sexual inclinations toward J.L., made any sexual comments toward her or about her to others. Further, the contact occurred in the middle of the day and in front of and in-close-proximity to other peers. The court also found that the length of the contact was not of consequence. That does not suggest sexual motivation.

The court based it’s finding of sexual motivation only on the fact that S.W.’s conduct “involved the thrusting of [S.W.’s] pelvis toward

[J.L.'s] butt, that it involved [S.W.] grabbing her breasts]. The court's findings of sexual motivation assumes that any touch of a breast or thrust is for the gratification of the actor. This ignores the multitude of other non-sexual reasons one might perform this kind of conduct i.e. joke, prank, humiliation. While the actions themselves might satisfy the elements of assault in the fourth degree they do not automatically show that they were sexually motivated. Because of this, this conduct is more like the contact in *Powell*, in that it is susceptible to innocent explanation, than it is like *Hardstad*.

Because the State did not prove the allegation beyond a reasonable doubt, this court should reverse the finding of sexual motivation.

F. Conclusion

Because S.W.'s contact was through the clothing and there is no additional evidence that S.W. acted for his own sexual gratification, this court should reverse the finding of sexual motivation.

Respectfully submitted this 17th day of January, 2017.

s/Gregory C. Link
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 49415-9-II
v.)	
)	
S.T.W.,)	
)	
Juvenile Appellant.)	

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